



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

May 7, 1990

The Honorable Eleanor D. Schorr
Arizona State Representative
State Capitol - House Wing
Phoenix, Arizona 85007

Re: I90-042 (R90-041)

Dear Representative Schorr:

You have asked whether the Arizona Health Care Cost Containment System (AHCCCS) may expend, without further legislative authorization, funds appropriated for acute care programs to purchase psychotropic or psychotherapeutic medications for chronically mentally ill patients. We conclude that, absent further legislative authorization, AHCCCS may expend such funds only for delivery of "acute care mental health services" to chronically mentally ill patients. You also asked whether A.R.S. § 36-2907(G) gives the Director of AHCCCS complete discretion to fund psychotropic medications for eligible chronically mentally ill patients. We conclude that A.R.S. § 36-2907(G) gives the Director discretion, subject to funding, to contract with the Department of Health Services (DHS) for provision of such medications to AHCCCS-eligible chronically mentally ill patients through a formulary developed by the Director of AHCCCS. This authority to provide psychotropic medications is "permissive," in the sense that the program may be funded out of monies which remain after fulfilling mandatory duties of the agency.

The authority of the Director of AHCCCS concerning mental health services is limited by A.R.S. § 36-2907(C), as follows:

The director (of AHCCCS) shall adopt such rules as are necessary to limit, to the extent possible, the scope, duration and amount of services Such rules shall provide for the prior approval of mental health services, and, to the extent possible and practicable, other services. The director shall adopt rules to limit mental health services to acute care only.

(Emphasis supplied.) The Director has promulgated rules pursuant to the above statutory authority, defining "acute mental health services" as "inpatient or outpatient health services provided to treat mental or emotional disorders, as necessary for crisis stabilization, evaluation and determination of future service needs." A.A.C. R9-22-101(1). We are required to read the statutory language according to its ordinary and common meaning. State v. Wise, 137 Ariz. 468, 470, 671 P.2d 909, 911 (1983). Therefore, we conclude from the statutory language that AHCCCS may provide mental health services only in the event of an acute episode and only to the extent of stabilization of the crisis and evaluation and determination of the patient's future service needs.

DHS, through its Division of Behavior Health (Division), is authorized to provide services to chronically mentally ill persons, as defined by A.R.S. § 36-550(3). See A.R.S. § § 36-3403(B)(1); 36-550.01; 36-502. "Chronically mentally ill" persons are defined as

persons, who as a result of a mental disorder . . . exhibit emotional or behavioral functioning which is so impaired as to interfere substantially with their capacity to remain in the community without supportive treatment or services of a long-term or indefinite duration.

A.R.S. § 36-550(3). This definition indicates that chronically mentally ill persons may require long-term services which are more extensive than the acute care services described above. However, AHCCCS is authorized to contract with DHS to provide psychotherapeutic drugs to AHCCCS-eligible chronically mentally ill patients under the following limitations:

Subject to legislative appropriation, the director (of AHCCCS) may, beginning on October 1, 1988, establish a limited formulary of psychotherapeutic drugs for persons defined as eligible pursuant to § 36-2901, paragraph 4, subdivision (b) and diagnosed as chronically mentally ill pursuant to § 36-550, paragraph 3 The director may enter into an intergovernmental agreement with the department of health services for the provision of psychotherapeutic drugs pursuant to this subsection.

A.R.S. § 36-2907(G) (emphasis added).

You have asked whether, pursuant to the above section, the Director of AHCCCS may expend a year-end surplus of acute care funds for AHCCCS-eligible chronically mentally ill patients. Because the legislature has appropriated the funds in question for acute care purposes only, we conclude that the Director may expend such funds only to provide acute mental health services to chronically mentally ill patients, and that the Director is not authorized to expend the funds for more extensive, long-term mental health treatment.

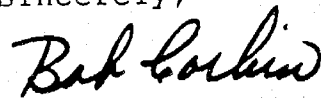
The portions of the 1988 and 1989 appropriation acts which fund the AHCCCS acute care program only refer to acute care services. The funds of the acute care program are designated "Total expenditure authority - acute care." Laws 1989 (1st Reg. Sess.) Ch. 311, § 27; Laws 1988 (2nd Reg. Sess.) Ch. 260, § 26. When the legislature provides that administrative expenses of a state agency are "subject to legislative appropriation," such expenses may not be incurred "until funds are specifically appropriated therefor." Cochise County v. Dandoy, 116 Ariz. 53, 57, 567 P.2d 1182, 1186 (1977). This means that the Director may expend surplus acute care funds only for acute mental health services to AHCCCS-eligible chronically mentally ill persons. A.R.S. § 36-2907(C); A.A.C. R9-22-101(1).

In response to your question concerning the Director's discretion to establish a formulary and funding of psychotropic medications for chronically mentally ill patients, we read section 36-2907(G) as authorizing the Director to deliver the funds through DHS, provided that funding is available and that the Director has established the formulary and has contracted with DHS to provide the medications. In section 36-2709(G), the legislature provided that the Director "may" establish the

formulary and contract with DHS for funding the services; that, having done so, the formulary "shall" consist of certain types of drugs. Where the legislature uses mandatory and discretionary verbs in a statute, it can be inferred that the legislature acknowledged the difference and intended each verb to carry its own meaning. Matter of Guardianship of Cruz, 154 Ariz. 184, 185, 741 P.2d 317, 318 (App. 1987). Applying this rule, we conclude that the provision of psychotropic medications to chronically mentally ill persons is a discretionary or permissive duty of the Director of AHCCCS. Consequently, the Director may expend surplus monies from the acute care budget of AHCCCS to provide these services so long as the expenditure is authorized by an appropriation act and sufficient funds are available to fulfill the mandatory duties of the agency. Wise v. First National Bank of Nogales, 49 Ariz. 146, 164, 65 P.2d 1154, 1162 (1937); Crane v. Frohmler, 45 Ariz. 490, 503-504, 45 P.2d 955, 961 (1935); Wiggins v. Kerby, 44 Ariz. 418, 423, 38 P.2d 315, 317 (1934).^{1/}

Therefore, we conclude that, absent further legislative authorization, AHCCCS may expend its surplus acute care appropriations to provide only "acute care mental health services" to chronically mentally ill patients. We also conclude that A.R.S. § 36-2907(G) gives the Director discretion, subject to funding, to contract with the DHS for provision of such medications to AHCCCS-eligible chronically mentally ill patients through a formulary developed by the Director of AHCCCS. The Director may expend surplus monies from the acute care budget of AHCCCS to provide the services so long as the expenditure is authorized by an appropriation act and sufficient funds are available to fulfill the mandatory duties of the agency.

Sincerely,



BOB CORBIN
Attorney General

BC:LPF:lpf

^{1/}We note that the legislature has listed mandatory duties of the Director elsewhere in A.R.S. § 36-2907. See, e.g., A.R.S. § 36-2907(A) ("the following health and medical services shall be provided pursuant to provider contracts"), A.R.S. § 36-2907(E) ("the director shall provide medically necessary heart transplants and immunosuppressant medications for these transplants"), A.R.S. § 36-2907(F) ("the director shall provide medically necessary autologous bone marrow transplants").